No. 18409

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK URSICH,

Appellant,

vs.

MANUEL G. DA ROSA, ANTONIO GARCIA DA ROSA, MARIA A. ROSA, VICTORINO GARCIA DA ROSA and MARY ROSA SANTOS,

Appellees.

APPELLANT'S REPLY BRIEF.

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TABLE OF AUTHORITIES CITED

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APPELLANT'S REPLY BRIEF.

I.

The Trial Court Erred in Refusing Appellant's Proposed Jury Instruction on Res Ipsa Loquitur.

The appellees cite the case of *Manhat v. United States,* 220 F. 2d 143, 146 (2d Cir. 1955), cert. den. 349 U. S. 966 (1955), for the principle that a prerequisite of the application of the *res ipsa loquitur* doctrine is that "the occurrence is otherwise unexplained." That case was tried in admiralty without a jury and the trial court found with ample evidentiary support that the cause of the accident was the act of plaintiff repair worker or of one of his fellow employees. The question on appeal was whether the evidence supported this finding, and the appellate court held that it did.

In the present case, the jury was the fact-finding body. The evidence disclosed a classical situation where appellant was entitled to an inference that the accident was caused by appellees' negligence. Appellant requested the trial court to give and it refused to give an instruction setting forth the inference required by the application of *res ipsa loquitur* and leaving to the jury the factual issue (which the judge decided in the cited case) whether there was an explanation of the cause of the accident either meeting or overcoming the inference of negligence. If the instruction requested had been given and the jury had found for appellees, then the question here would have been the same as in the *Manhat* case—that is, whether the evidence embodied an explanation of the accident rebutting the inference of negligence. Here, however, the question is whether that issue as to the adequacy of the explanation should have been submitted to the jury by a *res ipsa* instruction.

Moreover, in the *Manhat* case the only evidentiary explanation of the manner in which the accident did happen or could have happened completely exonerated the defendant of negligence. No such explanation was offered in the instant case. To the contrary, the explanation offered here did not negate as a cause of the accident a negligent failure to properly insert the hook in the eye of the fish. Indeed the effect of the explanation here was to admit negligence in that it was known to appellees that the fish was being handled in such a manner that it was likely to fall.

Appellees state that *Johnson v. United States,* 333 U. S. 46 (1948), permitted the application of the doc-

trine of *res ipsa loquitur* because there was no effort to explain how or why the block was dropped. Would the case have been decided differently if the man who dropped the block had testified that the block came loose and fell on the plaintiff below? Or if he had given several possible explanations of the accident, one of which involved his own negligence without negating his own negligence? Or if he had testified that he knew he was handling the block in a manner which might result in it falling?*

In *Berryman v. Bayshore Construction Company,* 207 A. C. A. 350, 352 (1962), relied on by appellees the evidence pointed to the acts of the plaintiff and his co-workers as causing the accident and indicated no act of defendant which led to the mishap. Here plaintiff did not participate at all in the lifting of the fish or in any act which led to its falling. *Res ipsa loquitur* is most typically applied to a case of this kind.

The doctrine from its inception in *Byrne v. Boadle* (1863), 2 H. C. 722, 159 Eng. Rep. 299, down to the present, has been commonly applied in cases of falling objects. As common experience tells us that barrels of flour do not fall from a window unless someone has been negligent, so, too, may we infer that a 140-pound fish does not fall from the hands of its holder unless he has been negligent.

Appellees state that the inference raised by the evidence in this case is one of the absence of negligence (Appellees' Br. p. 4). In support of this statement, appellees cite the testimony of the appellant, that Drus-

*Yet this is precisely the kind of "explanation" argued to be sufficient at pp. 1-2 of Appellees' Brief.

kovich "was *handling* the fish in the usual and proper manner." This, however, was not the testimony of the appellant; the appellant testified not that Druskovich was "handling" but that he was "*holding*" the fish in the usual and proper manner *but that appellant did not know whether Druskovich had hooked the fish under the bone.* [T. 88, 89, 90.]

Appellees' quote, on page 4 of their brief, implies that the appellant testified that Druskovich was not careless. If the appellees had completed the quote, the answer to the question, "Would you conclude Vido was careless?" would read as follows: "No, no, I can't say . . . [attempted interruption by counsel] . . . *I don't know.* . . ." (The emphasized words were omitted in the quotation at page 4 of Appellees' Br.) Appellant had repeatedly stated that the customary and proper way of inserting the hook was to put it under the bone and that he did not know whether Druskovich had done that part of the operation correctly—but that if he had the fish could not have come loose from the hook. [T. 88-91.]

The question as to the sufficiency of the rebutting testimony was for the jury to decide under proper instructions; the appellees' evidence did not dispel the inference of negligence or even amount to an explanation; therefore, it was error for the trial court to refuse to give the appellant's proffered instruction relating to the *res ipsa* doctrine.

II.

The Trial Court Erred in Giving Appellees' Instruction That No Inference of Negligence Could Be Drawn From the Mere Happening of the Accident (No. 27-A).

Appellees ignore the authorities cited by appellant on this point and do not attempt to answer appellant's argument that under certain circumstances, even when *res ipsa loquitur* is not applicable, the giving of the instruction that no inference of negligence could be drawn from the mere happening of the accident constitutes error.

III.

It Was Error for the Court to Give the Defendants' Instruction on Contributory Negligence (No. 45-B).

Once again, appellees have summarized testimony incompletely. Druskovich testified that the appellant's head was slightly above the level of the deck, or, as he put it, "Frank's head was not much head, his head was just—was out over the tank by the deck . . ." [T. 109.] Even if we construe the evidence as establishing that the appellant's *eyes* were above the level of the deck, there was no evidence whatsoever that he had the opportunity to evade the fish. The only evidence points to a contrary conclusion. Druskovich was only about 2 to 2-½ feet from the appellant so the fish traveled a very short distance before hitting appellant. [T. 121.] In addition, appellant was in a cramped area; the entire opening which was "pretty full" of fish and in which appellant was standing was about 2½ to 3 feet in diameter. [T. 29.] In addition, there was a bucket about 1-½ feet square in the same small area

occupied by appellant and filled with fish. [T. 79-80.] The fish he was hit by was a huge one weighing 130 to 140 pounds. [R. 106, 108.] It is therefore not remarkable that appellees' only witness, Druskovich, conceded that the appellant was in no way responsible for the fish hitting him.

It was error in the absence of any evidence of negligence of appellant for the trial court to give defendants' instruction on contributory negligence. (No. 45-B.)

IV.

The Trial Court Erred in Refusing to Give the Plaintiff the Statutory Rate of Interest, When It Awarded Maintenance, From the Date the Money Became Due.

Appellees imply that the appellant was not entitled to the stipulated amount of maintenance. But a look at the record on appeal indicates that appellees did not take the maintenance figure out of the air, but looked through the United States Public Health records and in fact did discount the days for which the appellant was in the hospital. [T. 200.] Appellees, quoting the trial court, imply that the court's decision was based upon the peculiar facts of the case. Since the parties stipulated as to the amount of maintenance to which the appellant was entitled, there were no "peculiar" facts which would bring into question the amount of maintenance. The court's decision denying interest could have only been based upon misunderstanding of the law.

Conclusion.

From the evidence adduced at the trial, the authorities, and the law, it is respectfully urged that the trial court erred and that the judgment should be reversed.

Respectfully submitted,

MARGOLIS & MCTERNAN,
By BEN MARGOLIS,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

BEN MARGOLIS